IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

NOS. 650 - 651

WILLIAM B. DENNY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF WILLIAM B. DENNY FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND SUPPORTING BRIEF.

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Nos.

WILLIAM B. DENNY,

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PETITION OF WILLIAM B. DENNY FOR A WRIT OF CERTIORARI TO REVIEW JUDGMENTS ENTERED NOVEMBER 5, 1945, BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AFFIRMING JUDGMENTS OF CONVICTION ENTERED JUNE 28, 1945, BY THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND, UNDER INDICTMENTS CHARGING CONSPIRACY AND THE MAKING OF FALSE STATEMENTS AS TO FITNESS OR LIABILITY FOR SERVICE IN THE ARMED FORCES.

OPINION BELOW.

The District Court filed no opinion in the cases, which were tried together. The opinion of the United States

Circuit Court of Appeals for the Fourth Circuit, dated November 5, 1945, has not as yet been officially reported, but is contained in the record at p. 103.

JURISDICTION.

The jurisdiction of this Court to issue a writ of certiorari to review the Judgments of the Circuit Court of Appeals, dated November 5, 1945, is invoked under Sec. 240 of the Judicial Code as amended (28 U. S. C. 347). See also Rule 38 of the Supreme Court, 28 U. S. C., following Sec. 354, and Rule 11 of the Rules of Practice and Procedure in Criminal Cases, promulgated May 7, 1934, 18 U. S. C., following Sec. 688.

FEDERAL STATUTE INVOLVED.

The Statute involved is 54 Stat. 894, U. S. C. Title 50, App. Sec. 311:

> "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another

to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *"

QUESTIONS PRESENTED.

I. A. Whether the constitutional and statutory rights of the petitioner are not infringed by a conviction under U. S. C. Title 18, Sec. 88, for conspiring to cause his evasion of service in the armed forces, when the indictment does not state that the petitioner was subject to the Selective Service Act, thus failing to charge that the object of the alleged conspiracy was illegal.

B. Whether the constitutional and statutory rights of the petitioner are not infringed by a conviction under U. S. C. Title 50 App. Sec. 311, when the indictment charges the making of a specific false statement as to fitness or liability for service, and in the same count adds an additional charge in defectively ambiguous language, under which most of the prejudicial evidence against the petitioner is admitted.[1]

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[1] The Indictments follow:

Conspiracy.

"The Grand Inquest * * * do on their oath present that * * * CHESTER T. RUBY and WILLIAM BERNARD DENNY, * * * did unlawfully, wilfully, knowingly, and feloniously combine, conspire, confederate and agree together and with each other to knowingly cause and be a party to cause the evasion of the said William Bernard Denny, * * * of service in the Land and Naval Forces, under the provisions of the Selective Training and Service Act of 1940, as amended, and the rules, regulations and directions made pursuant thereto.

"And the Grand Inquest aforesaid, * * * do further charge that at the hereinafter stated times during the continuance of said conspiracy, in pursuance of, and for the purpose of carrying out and effecting the object, design and purpose

II. Whether the constitutional and statutory rights of the petitioner are not infringed by a conviction under U. S. C. Title 50, App. Sec. 311, (requiring that a false statement relate to fitness or liability for service before it can be made subject to prosecution), when no evidence was produced to establish the relation of the alleged false statement to fitness or liability for service.

III. Whether the constitutional and statutory rights of the petitioner are not infringed by a conviction under U. S. C. Title 50, App. Sec. 311, when the confession of the petitioner, who was indisputably shown to be afflicted with paranoid schizophrenia and to be of a highly suggestible nature, was admitted in evidence, although it was shown to have been procured by a prolonged inquisition by agents of the Federal Bureau of Investigation, who questioned the petitioner under extremely vexing conditions and when the chief examining agent admitted that, at the close of the examination, the petitioner was in such an utter state of nervous collapse that the agent feared he would commit suicide.

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of said unlawful conspiracy, confederation, combination and agreement, the hereinafter named defendants did do and commit the several times and places hereinafter mentioned in connection with their names the several overt acts hereinafter specified:" etc. (Here followed a statement of five alleged Overt Acts.)

Substantive.

"The Grand Inquest * * * do on their oath present that WILLIAM BERNARD DENNY, * * * on or about the 22nd day of March, 1944, at Baltimore, in the State and District of Maryland, and within the jurisdiction of this Court, he being a person duly registered and classified under and in accordance with the provisions of the Selective Training and Service Act of 1940, as amended, and the rules, regulations, and directions made pursuant thereto, did knowingly, wilfully, unlawfully and feloniously make false statements as to his fitness for service under the provisions of the aforesaid act to officials of the Induction Center, Fifth Regiment Armory, Baltimore, Maryland, in that said William Bernard Denny * * * did falsely state to said officials that he was a high school graduate, in order to avoid taking the mental qualifications test; and did give other false information, which was intended to cause his rejection for service in the land and naval forces of the United States; contrary, etc."

STATEMENT OF THE CASE.

Proceedings below:

The petitioner was indicted on January 16, 1945 in the District Court for the District of Maryland, in two cases. The first indictment (Criminal No. 20510) charged that the defendant engaged in a conspiracy with one Chester T. Ruby "to cause the evasion" of the petitioner from military service, and alleged five overt acts committed pursuant thereto (Title 18, U. S. C. Sec. 88).

The second indictment (Criminal No. 20513), in which the petitioner alone was named, charged generally that he "did knowingly, wilfully, etc., make false statements as to his fitness for service * * * to officials of the induction center", and more specifically charged that he "did falsely state * * * that he was a high school graduate, in order to avoid taking the mental qualifications test"; and concluded generally that he "did give other false information, which was intended to cause his rejection for service." (U. S. C. Title 50, App. Sec. 311).

Demurrers were filed to each indictment and, upon the Court's overruling the demurrers, the petitioner pleaded "not guilty" as to each. The cases were then tried together before a jury which returned a verdict of "guilty" in both cases. The Court thereupon, on June 28th, 1945, sentenced the defendant to imprisonment for a term of five years in case No. 20513 (the substantive case dealing with the making of false statements, etc.), and to two years in case No. 20510 (the conspiracy case). The latter sentence was made to run concurrently with the five year sentence.

An appeal was then filed to the Circuit Court of Appeals for the Fourth Circuit which, on Nov. 5, 1945, affirmed the Judgments of Conviction.

Facts:

The petitioner was registered under the provisions of the Selective Service Act and was originally placed in Class 3A, the classification then given to registrants with dependents. His classification was later changed and he was eventually put in Class 1A, but obtained a deferment of three months for business reasons. There is no suggestion that the petitioner made false statements in connection with his earlier classification or his deferment, and the above matters were introduced merely as background evidence.

After the deferment above mentioned, the petitioner reported for a pre-induction physical examination at the 5th Regiment Armory in Baltimore. The examination consisted in the selectees passing in a sort of assembly line through various stages, in each of which they were examined by doctors who noted their findings on the work sheets carried by the men. Following this examination, the petitioner was rejected for service.

The President of the Medical Examining Board, Dr. Bogen, summarized the defects which caused the applicant's rejection as follows:

> "1, simple schizophrenia—paranoid reactions, D. Q. disqualified; 2, large protruding internal hemorrhoids, disqualified * * *." (R. 19).[2]

It is undisputed that the hemorrhoids condition actually existed and was sufficient ground for rejection (R. 19, T. 44). Likewise, the testimony of all the doctors, both for the prosecution and the defense, agreed that the petitioner was suffering from a disqualifying mental disease known as "*paranoid schizophrenia.*"

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[2] "R" refers to the printed Record; and "T" to the Transcript of Record filed in this court by the clerk of the court below, pursuant to stipulation of counsel.

The Government produced two phychiatrists who examined the petitioner at the Armory, neither of whom testified as to any statements made by the petitioner in the course of the examination. Dr. Conn testified that he did not remember this examination (R. 23) but from his notations on the sheet, "he (the petitioner) didn't say very much or practically nothing. He said practically nothing" (R. 23); that after speaking with and observing the petitioner, the doctor wrote down, "fearful of being with people, becomes very anxious" (R. 24); *but that these were not statements made by the petitioner* (R. 23), *but simply the doctor's inference* (R. 23) from his entire examination of the petitioner. Dr. Conn said that he had "no diagnosis particularly in mind," but thought that the petitioner "was different in my opinion from what I saw from a long list of men who came in" and, therefore, referred him for a confirmatory examination to another physician at the Armory (R. 24).

Dr. Irving J. Spear, the psychiatrist to whom the petitioner was referred, also did not remember the details of the examination (R. 25), and did not testify as to the statements made by the petitioner while under observation (R. 25). He stated that a finding is predicated on two important things: "The first one is the information one gets from the individual or the family, and the other is based upon the examiner's observation of the individual during the examination, taken with his experience, which permits him to arrive at a conclusion" (R. 26-7). Dr. Spear testified that the petitioner had been referred to him because the psychiatrist making the original examination "felt that he was not fully qualified to meet the responsibilities of military service * * * and he asked me to make an examination and based upon my examination I said that he was not qualified" (R. 25-6).

Dr. Spear's conclusion was that the petitioner suffered from *schizophrenia*, "a type of mental disease which is characterized by a personality which finds it difficult to adjust itself to an environment and in this particular type of mental disturbance is characterized by a feeling of inferiority, a feeling as if people were taking advantage of him, marked suspicion and reactions of that type. I said in my judgment he was a *paranoiac schizophrenic*, that he has a delusional mental condition and that he was of a naturally fearful, timid disposition" (R. 27). The doctor denied that his conclusion was based almost entirely upon the answers given by the petitioner to the questions asked him (R. 26), and said of the petitioner's appearance, "* * * he seemed anxious, apprehensive, suspicious" (R. 26).

Dr. Spear stated that in the course of his examination, he observed that the petitioner's hands *were sweating unusually* and that *upon scratching his skin in different places, he found evidence of a circulatory instability* (R. 25, 27). These were physical findings which could not be simulated (R. 27), and were included in the observations upon which his conclusion was based. The doctor testified that *schizophrenia* could be feigned; that is, a man could give an untrue history, but that he did not think the petitioner was faking and was conscientiously of the belief, based upon his entire examination, that the petitioner was a *schizophrenic* and, therefore, unsuitable for military service (R. 28).

Dr. Andrew C. Gillis, a psychiatric specialist, who examined the petitioner on four occasions (R. 50), sometime after Doctors Conn and Spear, said that he likewise found the defendant to be suffering from schizophrenia, "which means a split in a person's mind, a split in his thinking, so that the individual only lives in a world, a little

world of his own" (R. 50). The doctor said that his diagnosis was based upon the petitioner's general appearance and his reactions to questions (R. 50). "When I asked him questions regarding some very intimate matters that should cause some expression on his face or some emotion, sex matters, for instance, there was absolutely no expression whatever. He answered the most intimate questions in the same way he would answer if I asked what he had for dinner the day before. That remarkable lack of expression or lack of emotion and emotional change is abnormal and belongs to this classification I have already mentioned" (R. 50).

The doctor was asked whether *schizophrenia* could be faked, and replied that it could not. He said the history could, but that the mere recitation of statements tending to show *schizophrenia* "would mean nothing at all unless he showed by his actions and lack of emotion, or showed something in his appearance to justify that and the appearance could not be faked unless the man had made a special study of the disease and I doubt very much if a doctor could fake it because there are some very definite characteristics about it" (R. 51). The doctor denied that his conclusion was based largely on what the petitioner told him" (R. 53), and further stated that he believed the disease to be of long standing (R. 52).

The testimony of these medical specialists that the petitioner is a paranoid schizophrenic and therefore unfit for military service, was uncontradicted by any other evidence in the case.

The petitioner was jointly indicted with Chester Ruby for conspiring to cause his evasion from service in the armed forces. He first met Ruby upon visiting the Armory to see his younger brother who was in service and stationed there. Ruby, testifying on behalf of the prosecution, testi-

fied that nothing was said at that time about evading service, but that the conversation was restricted to a discussion of Ruby's attendance at boxing matches (T. 76). The petitioner told him that he frequently obtained tickets to these matches which he rarely used and would therefore be willing to give them to Ruby and would communicate with him when he had tickets to dispose of (T. 76).

Thereafter they met at a parking lot, where the petitioner kept his automobile and then, for the first time, Ruby said, the appellant inquired as to how he could get out of serving in the armed forces (T. 78). Ruby asked him whether he had any known ailments. The petitioner replied that he suffered from a very bad case of hemorrhoids and added: "I will never have any operation performed because I cannot stand anyone operating on me with a knife * * *. I would rather go through life suffering with these piles" (R. 29). Ruby said he told the petitioner to exaggerate the hemorrhoids condition, to say that he had dizzy spells, liked to be alone and wanted to avoid people and crowds (T. 83). However, when testifying in his own case, which was tried before this one, Ruby denied that he counseled the petitioner to evade service in the armed forces (R. 29).

Ruby also testified that he instructed the petitioner to tell the clerk whose duty it was to inquire about the extent of the inductees' education, that he had graduated from high school (R. 29). Yeoman Fonda, who made the inquiries concerning education, testified that the petitioner's sheet was marked "H. S.," the initials he marked when a selectee stated that he had completed high school (R. 21), in answer to his stock question: "How far did you go in school?" (R. 21), although he said that he had no independent recollection of asking the petitioner the question (R. 22).

The petitioner testified that he was asked the question as to how far he had gone in school and answered, "as far as high school," meaning that he had graduated from the 8th grade and had gone as far as high school begins (R. 59-60). This was all the testimony in the case concerning the making of the high school statement.

It is to be noted that although the Government charges that the petitioner made false statements to evade service, the statement "high school" could not have aided him in that design and could only have had the effect of *facilitating his entry* into the armed forces, because those who had not completed high school were given a simple literacy test which, if failed, might result in rejection; whereas those who had completed high school were not given the literacy test (R. 21, 29).

The Government offered no proof whatever that the statement "high school" related to fitness or liability for service. On the contrary, its evidence negatives any such relation. Ruby said that the statement "high school" had nothing to do with acceptance or rejection for service, but that he merely told the petitioner to make it in order to get out of the Armory more quickly (R. 29). More authoritative testimony concerning the irrelevance of the high school statement to fitness for service was given by the Government's witness, Dr. Bogen, the President of the Examining Board of Physicians (whose duty it was to determine the final classification of each selectee) who testified that this statement had no relation to medical fitness (R. 19).

The Government, over objection, was permitted to introduce in evidence a confession or statement obtained from the petitioner by agents of the Federal Bureau of Investigation. The statement was secured under the following circumstances:

One of the F. B. I. agents, DuBois, came to the petitioner's office and interrogated him briefly about a woman who was involved in a "security" matter (R. 33). This woman had formerly lived at a hotel operated by the petitioner. The agent told the petitioner that he had the woman's file in the F. B. I. offices and since he would like to refer to it during their conversation requested the petitioner to accompany him there for "a few minutes" (R. 62). The defendant agreed and the agent led him to the F. B. I. offices, through a series of rooms, and finally to an isolated and very small room (R. 35, 43, 46). After conversing about the woman's case with another agent present for a brief period, DuBois suddenly shouted that they wanted to know all about the petitioner's connection with Ruby and his rejection at the Armory (R. 34, 39). With that, the agents began to grill the petitioner (R. 39-41, 63-6).

The day was exceedingly hot (R. 34, 35), the room small, stuffy and secluded, and the petitioner testified that he had a headache and kept asking the agents to let him go out in the corridor to get some air (R. 40, 64). As the petitioner answered the questions, the agents poked fun at him, called him a liar (R. 39, 63) and continued to press unrelentingly for answers satisfactory to them (R. 39, 64). They told the petitioner that he could not leave the room until he had given them a statement of all he knew that satisfied them, and if he did not do so, it would "go very tough on you, but if you tell us everything you know and get a satisfactory answer, nothing will come of it because we don't want you, you are just small fry, we want Ruby" (R. 39, 63).

The petitioner said that after the questioning had proceeded for a considerable period of time, he was so dazed, alarmed, cowed and agitated that he felt he was about to collapse and would have done or said anything to get out of the room (R. 40); but that the agents told him he

could not leave (R. 40, 63), and he thought they had the right to detain him; and that he would not have dared to leave without their permission (R. 67).

It will be recalled that the undisputed evidence of the medical experts was that the petitioner was afflicted with the mental disease known as paranoiac schizophrenia. Dr. Gillis testified, without contradiction, that one of the characteristics of the petitioner's disease was an accentuated suggestibility; that he could be induced to say or do almost anything when under nervous strain (R. 51-2) in order to get himself out of an annoying situation. That the petitioner's situation was annoying is certainly an extreme understatement.

The ordeal continued, according to the petitioner's testimony, for approximately 3½ hours, while the agents said it lasted about 2½ hours (R. 34, 41). *Yet the statement finally secured was short, consisting of only 2⅓ pages, written in longhand.* The petitioner said that he did not read the statement, but signed it to get out of the room (R. 40, 64, 65).

Both agents testified that the statement was given voluntarily. However, they differed significantly in describing the petitioner's condition towards the end of the session. Agent DuBois testified that the petitioner was "*so wrought up I was afraid he might commit suicide or something, and for 15 or 20 minutes, I was reassuring him* * * *" (R. 36). This substantiates the petitioner's story that he was in a state of utter collapse and could scarcely walk; and that even after the agents permitted him to leave, he sat on the bumper of his automobile for about a half hour before he had sufficient strength and presence of mind to be able to drive his automobile (R. 40, 66).

However, despite the petitioner's visibily distraught condition, the other agent, Houchins, testified that he displayed no particular signs of emotion (R. 44, 45), and that they shook hands all around when the petitioner left (R. 46-7). It is interesting to note that each agent did not hear the testimony of the other relating to the petitioner's examination, since all the witnesses were excluded from the court room until their turn to testify (T. 16-17). Of further significance is the fact that the statement signed by the petitioner contains no reference to the making of statements at the induction center, but states merely that he asked Ruby how he could be rejected, and that Ruby "refused to explain but merely said that it would be taken care of" (R. 48).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in failing to hold:

I. That the District Court for the District of Maryland erred in overruling the demurrer to the indictments, because:

A. The conspiracy indictment failed to charge that the petitioner (whose evasion from service was to be accomplished) was subject to the Selective Service Act of 1940. It therefore failed to allege an illegal object and charged the commission of no offense. Moreover this indictment was defective in that it merely charged generically that the petitioner conspired to evade service without stating the particulars or species of the "evasion".

B. The indictment for the substantive offense contained two distinct charges, the second of which stated that the petitioner "gave other false information, which was intended to cause his rejection for service." This latter portion of the indictment the Circuit Court of Appeals held to be defective, yet sustained the District Court's action in

overruling the demurrer on the fictional hypothesis that by regarding the defective language as surplusage, no harm was occasioned the accused. However, this portion of the indictment decisively prejudiced the petitioner, for, without being apprised of the precise nature of the evidence to be adduced thereunder, he was confronted with a mass of prejudicial evidence which was admitted solely because the indictment contained the convenient "surplusage."

II. That the District Court for the District of Maryland erred in refusing to instruct the jury that their verdict should be "Not Guilty" on the substantive indictment, because the Government had produced no evidence to establish the relation of the alleged false statement "high school" to fitness or liability for service.

III. That the District Court for the District of Maryland erred in admitting the petitioner's confession in evidence, because the circumstances under which it was made when considered in the light of the petitioner's affliction with *paranoid schizophrenia* and his highly suggestible nature, rendered it involuntary as a matter of law.

REASONS FOR GRANTING WRIT.

I. Misinterpretation of decisions of this Court and conflict with decisions of other circuit courts of appeals.

The court below interpreted this Court's decision in *Hagner v. U. S.*, 285 U. S. 427, 76 L. Ed. 861, as removing all requirements for an indictment other than that it apprise the petitioner of what he needs to know for his defense and that it remove the danger of double jeopardy. The Circuit Court overlooks that in the *Hagner* case it was said (p. 433):

> "It, of course, is not the intent of Section 1025 [of Revised Statutes, U. S. C. Title 18, 556] to dispense with the rule which requires that the essential elements of an offense must be alleged * * *."

The conspiracy indictment did not set forth the essential ingredients of the crime, because it failed to charge that the individual whose evasion from service was to be accomplished was in fact subject to service and thus, in effect, failed to charge an illegal object. The Circuit Court's opinion recognized that the charge was imperfect:

> "We do not mean to give our approval to a form of indictment which omits a pertinent allegation so easily made as that omitted in the pending case * * *,"

Nevertheless, the indictment was sustained. It is submitted that it was improper for the court to disregard the failure to allege that the object of the conspiracy was illegal because, without such statement, the indictment did not charge the commission of an offense.

The court below appears to regard the decision in *Ruthenburg v. U. S.*, 245 U. S. 480, on a similar indictment, as no longer controlling. In the *Ruthenburg* case, this court interpreted the Selective Draft Act of 1917, 50 U. S. C. App. Sec. 201 et seq. (which is closely similar to the act under examination) as requiring that the amenability to the act of the individual who was to evade service must be alleged. In the instant indictment this charge was not made. Yet the Circuit Court chose to disregard the clear meaning of this court's decision in the cited case.

Moreover, the view of the Circuit Court below is in conflict with the decisions in

Caldwell v. U. S. (C. C. A. 5), 139 F. (2) 121;
U. S. v. Blakeman (D. C. N. D. N. Y.), 251 F. 306;
Frankfort Distilleries v. U. S. (C. C. A. 10, 1944), 144 F. (2) 824;
U. S. v. Waltham (S. D. N. Y., 1942), 47 F. Supp. 524; and
U. S. v. Buerk (D. C. E. D. Wis., 1941), 38 F. Supp. 409;

in which it has uniformly been stated that an indictment must, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the crime.

The determination of how far the requirements as to indictments have been relaxed, and as to whether the prior decisions of this Court on the subject are still controlling, is an important question which should be determined by this Court, since the sufficiency of future indictments will be determined by the principles adopted by the Circuit Court of Appeals in this case, namely that an indictment which does not state the essential elements of a crime is nevertheless not demurrable.

The serious error committed by the court below in its consideration of the indictments is clearly apparent as to the substantive indictment. The Circuit Court indicated that its chief concern was as to whether the petitioner was prejudiced by reason of an imperfect charge. However, the court did not apply its expressed test to the facts in the case. In this indictment the petitioner was charged with having made a specific false statement relating to his fitness for service, namely, that he stated he was a high school graduate. In the same count it was charged that the petitioner "did give other false information, which was intended to cause his rejection for service," etc. The court below observed that this last portion of the charge was defective:

> "This last clause is obviously so vague that it gave the defendant no information as to the specific charge he was to meet * * *."

Yet the defective language was waived aside as mere surplusage. It is difficult to understand how anything could have been more decisively prejudicial to the petitioner than the presence of this defective language, for it was only by

reason of its presence that the major portion of the prejudicial evidence was admitted.

The Circuit Court of Appeals in its opinion used this prejudicial evidence as the basis for affirmance of the lower court but, as a ground for refusing to reverse, declared that this part of the indictment, except for the presence of which the prejudicial evidence would have been inadmissable, could be regarded as "surplusage"!

II. The court below incorrectly decided an important question of federal criminal law.

Involved is the question as to whether the Government, in a prosecution for making false statements as to fitness or liability for service under U. S. C. Title 50 App. Sec. 311, was required to prove the relationship of the statement to fitness, etc., for service in the same manner and degree as any other essential element of a crime must be proved—that is to say, by direct, positive and satisfactory evidence; or whether this element could be supplied by the Government's theory or conjecture, without evidence tending to show that the statement related to fitness, other than proof that the statement itself was made.

In considering the alleged false statement with which the petitioner was charged, namely, that he stated he had completed high school, the court below dispensed with the necessity of proof to establish the relation of that statement to his fitness for service by resort to the convenient generalization that it "obviously bore upon his fitness." We believe this view to be erroneous. The Statute specifically states that only false statements *as to fitness,* etc., shall be subject to prosecution. By this restrictive language, the proposition that any false statement may violate the Act seems to be clearly negatived. It is submitted that the relationship of a false statement to fitness can be established only by

proof of that relation. It cannot be *inferred* from a statement such as the one with which the petitioner is here charged. In the case at bar, the record shows, the Government relied on the statement itself, without introducing further evidence.

Inasmuch as many similar prosecutions are still pending throughout the country, this Court should determine whether the Government has the burden of establishing the relationship of the alleged false statement to fitness for service by proof *dehors* the statement.

III. The effect of uncontradicted evidence that the petitioner was suffering from *paranoid schizophrenia*, one of the characteristics of which rendered him highly suggestible, on the admissibility of a confession made by him, is an important question in the administration of criminal law which should be determined by this Court.

The record established without contradiction the petitioner's mental disease and suggestibility; his subjection to a lengthy and unrelenting grilling under trying conditions by the agents of the F. B. I., which finally resulted in the making of the confession; that at the time the statement was signed, or within a few minutes thereafter, the petitioner was in such an extremely wrought-up nervous state that he appeared ready to take his life, if necessary, in order to escape from further interrogation.

The precise point presented in the court below was as to whether the petitioner's diseased mental condition and extreme suggestibility (which rendered him unable to resist sustained questioning) invalidated a confession made under the circumstances briefly set forth above. Examination of the court's opinion reveals, however, that the issue was not met. The court disregarded the petitioner's mental infirmity and decided the question as if the petitioner were

a completely normal individual. We submit, this was improper and establishes an unsound and unfair rule which should not be permitted to solidify into binding precedent.

Respectfully submitted,

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PETITIONER'S

BRIEF

BRIEF IN SUPPORT OF THE PETITION.

FACTS.

The facts have been set out in the Petition.

ARGUMENT.

I.

The Rulings on the Indictments by the Court below are at variance with the fundamental requirements of criminal pleading, the prior decisions of this Court and conflict with decisions in other Circuit Courts of Appeals.

A. The Conspiracy Indictment.

The Circuit Court of Appeals regarded the failure of the indictment to allege that the petitioner was subject to the act which he was charged with a conspiracy to violate as non-prejudicial. It is submitted that such casual dismissal of this objection ignores the established rule that an indictment which fails to state a crime is demurrable. The petitioner urges that an indictment charging him with conspiracy to cause his evasion from the armed forces without alleging that he is subject to the terms of the *Selective Service Act* charges no crime in that if he was not subject to its terms a conspiracy to evade it would constitute no crime.

The court below rightly held that an indictment must apprise the accused of what he needs to know for his defense and must be sufficiently specific to remove the danger of double jeopardy. However, in addition to these requirements, it is necessary that the indictment clearly state all the essential ingredients of the crime charged. This is a fundamental requirement which all of the authorities, in-

cluding the decisions relied on by the Circuit Court below, recognize as essential. The petitioner urges that in disregarding these requirements the court below erred, and as a result, its decision is in conflict with the rule announced in its own prior decisions and those of other Circuit Courts of Appeals.

In *Pettibone v. U. S.*, 148 U. S. 197, 37 L. Ed. 419, 135 S. Ct. 542, this Court said:

> "if any essential element of the offense is omitted, such omission cannot be supplied by intendment or implication."

In *Caldwell v. U. S.*, 139 F. (2) 121, an indictment for conspiracy to violate the Selective Service Act was held defective when it alleged the defendant's failure to inform his draft board of "a change of address," the court pointing out that the Statute made it an offense to fail to keep the Board informed of *an address where mail would reach a registrant.*

The instant indictment alleges that the petitioner conspired with another "to cause the evasion of the said William Bernard Denny (the petitioner) * * * of service in the land and naval forces * * *." The *Selective Service Act*, 50 U. S. C., App., Sec. 303, declares that male citizens and male persons residing in the United States, between the ages of eighteen and forty-five, shall be liable for training and service. Consequently, a person not within the prescribed age range is not liable for service under the Act. Therefore, to constitute a sufficient charge of conspiracy, the indictment must allege either that the one who was to evade the Act as a result of the conspiracy was in fact subject to the Act, or was within the prescribed age range. Strictly correct criminal proceeding, indeed, would seem to require both allegations. In the immediate case, how-

ever, *neither* of these necessary allegations appears. The indictment, therefore, is fatally defective because it fails to set forth facts to show that the object of the conspiracy was unlawful.

In *Ruthenberg v. U. S.*, 245 U. S. 480, 62 L. Ed. 414, 38 S. Ct. 168, this Court recognized by way of *dictum*, that an indictment charging a violation of the *Selective Service Act* must state either that the defendant is subject to the Act or is within the prescribed age range. There the indictment alleged that the defendant was a male person within the specified ages, but did not allege that he was a citizen, and the indictment was attacked as insufficient because it lacked that allegation. This Court dismissed the argument, stating:

> "But this overlooks the fact that although only the persons described were subject to military duty under the terms of the Act, by Section 5, 'all male persons between the ages of twenty-one and thirty, both inclusive,' (with certain excepts not here material), were required to register. *It was sufficient to charge, therefore, as the indictment did, that Schue was a male person between the designated ages*" (Italics ours).

In the immediate case the indictment does not state that the petitioner was subject to the *Selective Service Act;* and does not allege that he was within the age group designated by the Act.

The court below recognized that the failure to make either of the allegations above referred to rendered the indictment imperfect:

> "We do not mean to give our approval to a form of indictment which omits a pertinent allegation so easily made as that omitted in the pending case,"

but, nevertheless, decided that the indictment was sufficient because the "defendant has suffered no prejudice by the failure to state a fact so well known to him as his own age, or his amenability to the provisions of the Statute."

Such reasoning, if applied in the *Caldwell* case, *supra*, would have resulted in the holding that whether the defendant failed to notify the Draft Board of a change of address or whether he failed to keep the Board informed of an address where mail would reach him were *facts well known to him* and, therefore, the failure of the indictment to allege the specific facts proscribed by the Statute was non-prejudicial.

However, in the *Caldwell* case, the Court stated (p. 124):

> "While it may be conceded that the failure to notify the board of a change in address in all probability would as a matter of fact frequently lead to a failure to keep the Local Board advised of the address where mail would reach the registrant, *this does not necessarily follow*, and at most is only one of the fact elements going to make up the offense rather than the offense itself. On the other hand, one might change his place of residence six times and yet comply with the provisions of the statute. In a case where liberty may be at stake, *the criminal charge should measure up to the test of the statute, and then be supported by facts.* It is not proper to permit the charge of an act which is innocent in itself under the statute and regulations, to be used as a means of trial and as authority for the introduction of evidence disclosing the commission of an offense. In other words, a violation of the statute and regulations should be charged rather than the allegation of an act which may or may not constitute and offense." (Italics ours)

The conspiracy indictment in the case at bar may or may not constitute a crime, depending on whether the peti-

tioner was subject to the Selective Service Act, and thus is defective within the test of the *Caldwell* case, *supra*, holding that a violation of a Statute should be charged rather than the allegation of an act which *may* or *may not* constitute an offense.

It is submitted that in neglecting to allege either of the necessary allegations referred to above, the indictment did not adequately charge the commission of the crime intended to be charged and thus violated the fundamental rule that the charge must clearly set forth all the essential elements of the crime.

Furthermore, the ambiguous nature of this indictment exposes the accused to the danger of double jeopardy. It charges merely that the petitioner conspired to cause his evasion from service and and fails to specify the manner in which the evasion was to be effected. This Court pointed out in *U. S. v. Keegan*, 65 S. Ct. 1203, that there are at least two types of evasion under the Selective Service Act: (1) the making of a false registration and (2) the making of false statements relating to fitness. In addition, the Act makes it indictable to "otherwise evade" service.

It is consequently apparent that the mere charge of conspiracy to *evade*, without specifying the means to be employed, thus specifying the *part of the Act* which was to be violated, is so vague and ambiguous as utterly to fail to inform the defendant of the precise charges against him, and does not enable him to prepare his defense with knowledge of the charges he is called on to defend.

In *United States v. Hess*, 124 U. S. 483, 31 L. Ed. 516, the defendant was indicted for having devised "a scheme to defraud divers other persons" intending to effect it by inciting them to open communications with him through the post office department. The statute under which the

indictment was drawn, in general terms made it a crime for any person "having devised * * * any scheme or artifice to defraud" to effect it by inciting others to open communication with him through the post office department. It was held that the indictment was defective; that the statute on which it was based stated only the general nature of the prohibited offense, and that the indictment, in simply repeating its language, did not disclose the particulars of the alleged offense. The court pointed out that the statute was directed against the "devising or intending to devise of any scheme or artifice to defraud", and stated that as a foundation for the charge, "a scheme or artifice to defraud" must be *stated*, which the accused either devised or intended to devise, *with all the particulars as are essential to constitute the scheme or artifice and to acquaint him with what he must meet on the trial.*

Just as in the *Hess* case the court recognized that there could be many different schemes to defraud and therefore the scheme had to be particularized to inform the defendant of what he had to meet at the trial, so in the case at bar, there are, as already pointed out, various ways in which the Selective Service Act can be evaded and consequently an indictment charging in general terms a "conspiracy to evade" does not conform to the test of particularity required by the *Hess* case.

The petitioner could, with no degree of definiteness or certainty, plead *autrefois convict or acquit* to a subsequent indictment under this section, because it could be contended that he was being indicted for a violation of a different part of the Section than that for which he was previously indicted.

The court below attempts to supply necessary allegations of the indictment by recourse to a *reductio ad absurdum*

of our objections and states that it was obvious that the defendant suffered no prejudice by reason of the failure to allege his age or his amenability to the Statute, because these were facts well known to him. But the criticism cannot be disposed of by any device of argumentation. The rule in criminal indictments is that the necessary allegations must be made clearly and with certainty. They cannot be supplied by intendment or implication. As stated in *Pettibone v. U. S.*, 148 U. S. 197, 37 L. Ed. 419, 13 S. Ct. 542:

> "All the material facts and circumstances embraced in the definition of the offense must be stated and * * * if any essential element of the offense is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital."

See also

U. S. v. Hess, supra.

And in

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588:

> "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, include generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars."

Are these statements meaningless?

Although not directly stated, the court below seems to regard these decisions as no longer binding, and relies on Title 18 U. S. C., Sec. 556, which states that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, not tending to the prejudice of the petitioner.

Our objection to this indictment is a matter of substance and not merely of form. This is illustrated by the case of *U. S. v. Carll,* 105 U. S. 611, 26 L. Ed. 1135, in which the Statute made it an offense for any person with intent to defraud to utter any counterfeited obligation or other security of the United States. The indictment in the words of the Statute charged that with intent to defraud the defendant did utter such an obligation. This Court held that the indictment was defective and not cured by verdict because, as it pointed out (p. 613):

> "The language of the statute on which the indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within the meaning and object."

Pursuant to this language, the Court held that the omission in the indictment of the allegation, that the defendant knew the instrument which he uttered to be false makes the indictment fatally defective and fails to charge him with any crime. Such an omission, said the Court, "* * * is a matter of substance and not a 'defect or imperfection in matter of form only,' within the meaning of Sec. 1025 of the Revised Statutes."

Thus, in the *Carll* case the court regarded it as a substantial error and not merely a defect in form to fail to allege that the defendant *knew* that the security was counterfeit although *knowledge was not a statutory requirement.* The court did not say as did the Circuit Court of

Appeals in the immediate case that knowledge of the counterfeiting was a fact well known to the defendant and that, consequently, he was not prejudiced, but held that in its failure to allege *all* of the ingredients of the crime (both common law and statutory) the indictment was fatally defective.

It is difficult to understand how an objection that an indictment does not set forth all the essential elements of a crime can be regarded as a matter of form only. The cases above cited have never been overruled, and it is submitted they cannot be dismissed. Moreover, the Court's reliance on *Hagner v. U. S.*, 285 U. S. 426, and the so-called modern "practical" rule is misplaced, for in the *Hagner* case, the Court said (p. 433):

> "It, of course, is not the intent of Section 1025 (18 U. S. C. A., Sec. 556) to dispense with the rule which requires that the essential elements of an offense must be alleged; but it authorizes the courts to disregard mere loose or inartificial form of averment."

B. The Substantive Indictment.

The indictment for the substantive offense alleges that the petitioner "did make false statements as to his fitness for service * * * to officials of the induction center * * * in that said William Bernard Denny * * * did falsely state to said officials that he was a high school graduate, in order to avoid taking the mental qualifications test; and did give other false information, which was intended to cause his rejection for service in the land and naval forces of the United States * * *."

The Court held that the concluding clause, that the defendant gave other false information which was intended to cause his rejection for service, was "obviously so vague that it gave the defendant no information as to the specific

charge he was to meet * * *." However, the defect was waived aside as "surplusage", seemingly on the theory that the accused was not prejudiced thereby.

An examination of the Record in this case reveals, however, the decisively prejudicial nature of this defective language. If this ambiguous language were not in the indictment, evidence would have been admissible only insofar as it related to the specific false statement alleged, namely, that the petitioner stated he was a high school graduate. It will be seen from the Record that by far the greater part of the evidence against the petitioner bore no relationship to this specific allegation, but was admitted under the concededly defective language of the indictment. The evidence admitted thereunder included the following highly prejudicial testimony, which the court below stressed in its opinion:

All the evidence relating to the petitioner's physical and mental examinations at the induction center; the testimony of the psychiatrists called by the Government; the evidence of the petitioner's appearance at the Armory; and his conduct in his personal business affairs (as bearing upon the reality of the existence of petitioner's mental affliction). The inquiry into the above matters comprised the bulk of the harmful evidence against the petitioner. If the Government had been restricted to proof of the false statement specifically alleged—high school—without any reference to the other matters which were admitted under the "obviously vague" and defective portion of the indictment, it may well be doubted whether a conviction would have been returned.

Had the evidence been properly restricted to the high school statement, the jury would have been more disposed to believe that an intentional misstatement had not been

made and that the designation "H. S.," standing for "high school," was made by the clerk through misunderstanding or error, inasmuch as the same question was asked of four hundred individuals in rapid order; the clerk had no independent recollection of what the petitioner told him; and the petitioner testified that when he was asked how far he went in school he answered, "As far as high school", meaning he went as far as high school begins, or up to high school.

However that may be, it is, we submit, apparent that the defective portion of the indictment substantially prejudiced the petitioner, because pursuant to it, a flood of prejudicial evidence was introduced by the Government. Therefore, the court below in regarding the defective language as mere surplusage, ignores reality because that portion of the indictment furnished the ground of the conviction.

II.

In sanctioning a Judgment of Conviction under U. S. C. Title 50, App., sec. 311, wherein the Government offered no proof of the relation of the alleged false statement to fitness or liability for service, the Court below misconstrued the Act to the Petitioner's serious prejudice.

The indictment for the substantive offense, which was drawn under 50 U. S. C., App. Sec. 311, proscribes the conscious making of any false statement as to the "fitness or unfitness, liability or nonliability of himself or any other person," etc., for service in the armed forces. Thus, the Government has the burden of establishing two distinct components of the stated offense: (a) the making of the false statement and (b) the relation of the false statement to fitness or liability for service.

Laying aside the question as to whether the statement high school was made as an intentional falsehood (as to which there is considerable room for argument), the Government did not prove that this statement related to fitness. The court below *asserted* that the statement high school "obviously" related to fitness and approved the conviction, although the relationship to fitness for service had not been shown. It, therefore, *necessarily* held that the alleged false statement itself was sufficient evidence from which the jury could *infer* the relationship to fitness. It is submitted that under the Statute the *nexus* between the false statement and fitness, etc., for service must be established by competent *proof*, in addition to proof that the particular statement was made. Unless such proof is required the second statutory requirement becomes meaningless.

Not only did the Government fail to produce any evidence tending to show relationship of the statement to fitness, but the evidence of its own witnesses was to the *contrary*. Doctor (Major) Ben Bogen, who was chief of the examining board, stated that he did not take high school into consideration from a medical standpoint in determining whether or not a man should be rejected. The District Attorney stated, in response to Major Bogen's answer, that he would have someone else explain how the high school statement was taken into consideration, but he failed to produce the promised statement at any succeeding state of the case and, at its conclusion, his promise remained unfilled. The Government's witness, Ruby, likewise testified that the statement high school had nothing to do with acceptance or rejection for service.

Although the Government offered no evidence that the statement high school related to fitness, it took the position that it met the burden of proving this essential in-

gredient by testimony that if a man was not a high school graduate he would be held for an examination to determine the extent of his schooling. This last testimony was given by only one witness, Ruby, who was merely a clerk and who, as above noted, also stated that the high school statement had nothing to do with acceptance or rejection. The Government *supplied no other evidence*, but *theorized* that the necessary delay consequent to the taking of the literacy test *might* have enabled the induction officials to ascertain that the petitioner was qualified for service. It is significant, however, that the Government produced no evidence from the officials of the induction center to substantiate its theory. Nevertheless, the Government's conjecture was accepted by the court below.

The Government did not undertake to describe the examination referred to, but indicated that its function was to determine whether a man was literate or illiterate. It was not contended that the statement in any way resulted in avoidance of the usual psychiatric examination given to the selectees, because the evidence clearly shows that the petitioner was given that examination.

It is submitted that evidence that the petitioner would have been given an examination as to his schooling if he had not made the high school statement is not equivalent to proof, as the Statute requires, that the statement in fact related to fitness. It is merely the substitution of a theory for those facts which the Statute unequivocally demands that the Government prove as an essential part of its case. The Government was under the burden of going further and showing why or in what manner the examination allegedly avoided, related to fitness. In failing to do so, the Government failed to prove its case.

Moreover, the indictment charged that the defendant made a false statement in order to evade service. It would,

therefore, logically be incumbent upon the prosecution to show that the false statement brought about, or had a tendency to bring about, the defendant's rejection. But the Government did not supply any evidence to that effect. In the absence of evidence, it is more reasonable to assume that the statement "high school" enhanced the defendant's chances of being accepted for service because, as the Court will recognize, a high school education would not disqualify a man from service, although the lack of it might render a man ineligible under Army educational standards. Therefore, if the false statement was made, instead of tending to effect the defendant's rejection, it tended to accomplish the reverse of what the Government was charging, for it eliminated an additional barrier to the defendant's acceptance for service.

In summary, if we are correct in our analysis of the Statute as requiring satisfactory proof of the relation of the alleged false statement to fitness, it follows that the court below misinterpreted the law to the petitioner's undoubted prejudice by sanctioning the practice of permitting the jury, in the absence of evidence, to speculate that an alleged false statement related to fitness.

III.

In disregarding the Petitioner's mental affliction (one of the characteristics of which was an extreme suggestibility), the Court below failed to consider the precise question presented it and incorrectly approved the admission in evidence of an involuntary confession.

As stated in the Petition, the court below was requested to determine whether the petitioner's affliction with *paranoiac schizophrenia* and his highly suggestible nature rendered the confession, made under the circumstances

hereafter related, involuntary in law. However, the court below disregarded the point by treating the petitioner as if he were a completely normal individual.

There was no dissent from the findings of the three physicians who testified at the trial that the petitioner is afflicted with *paranoiac schizophrenia* and was, therefore, unfit for military service. It was further uncontradicted that one of the peculiarities of the petitioner's malady was an accentuated suggestibility; and that he could be induced to say or do almost anything to escape from an annoying situation.

In its opinion the court below remarked that it was not suggested that the petitioner "was mentally incapacitated as to be incapable of the commission of crime." We do not contend that the petitioner's disease was of such nature as to be embraced within the rigid definition of criminal non-accountability, but we do maintain that his affliction and extreme suggestibility were important factors to be considered in determining whether a confession made under the circumstances shown in evidence could be regarded as voluntary. This Court has said:

> "A confession is voluntary in law if, and only if, it was in fact voluntarily made * * *. But a confession obtained by compulsion must be excluded, whatever may have been the character of the compulsion."
>
> *Wan v. U. S.*, 266 U. S. 1, 69 L. Ed. 131, 45 S. Ct. 1.

As expressed in *Ashcraft v. Tennessee*, 322 U. S. 143, 154, 88 L. Ed. 892, 64 S. Ct. 921, the individual making the confession must have "mental freedom" to confess or deny suspected participation in crime.

The effect of a confessor's diseased or weak mentality upon the admissibility of a confession does not appear to have been dealt with in this court.

However, the authorities which have considered the point have invariably given careful attention to the confessor's mentality. The same set of circumstances might as to one individual improperly induce a confession, while as to another they would have no effect. Therefore, in determining "voluntariness" the authorities take into consideration the mentality of the confessor and apply the test subjectively. As stated in an annotation in 18 L. R. A. (N. S.) 786, under the heading, "Age, situation and character of accused":

> "Upon the question of whether a confession is voluntary, the age, character and situation of the accused at the time it was made is an important consideration; for manifestly, the will of the defendant, if he is of tender age or of weak intellect, may be more easily overcome by the same set of circumstances than that of one who is more mature or more intelligent. Greater attention should be paid to his situation and surroundings for the same reason. This is the position taken by the courts, whatever the theory of exclusion of incriminating statements may be."[3]

Despite the manifest soundness of the rule, it is significant that the court below refused to consider the effect of the uncontradicted mental weakness of the petitioner

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[3] In the following state decisions the defendant's mental weakness was stressed:

State v. Squires, 48 N. H. 364;

Cady v. State, 44 Miss. 332 (much depends upon the intelligence of the accused or want of it);

Spears v. State, 2 Ohio St. 583 (court must look to the circumstances among which are the strength or weakness of the prisoner's intellect, his knowledge or his ignorance);

Porter v. State, 55 Ala. 95;

Biscoe v. State, 67 Md. 6 (much, very much, depends upon the age, experience, the intelligence and the character of the prisoners);

and see

Wharton's "Criminal Evidence," 11th Ed., Vol. 2, Sec. 631, p. 1056 (the court should look to the circumstances under which the confession is alleged to have been made and consider the strength or weakness of the accused's intellect, his knowledge or his ignorance).

upon the circumstances under which the confession was obtained.

The court below has attempted to dispose of the question by regarding the facts concerning the making of the confession as in conflict and that, therefore, the question was one for the jury. However, enough uncontradicted facts exist which, when coupled with the petitioner's mental infirmity, establish conclusively the involuntary nature of this confession.

These facts are uncontradicted. F. B. I. Agent DuBois came to the petitioner's office and told him that he was conducting an inquiry concerning a woman who was involved in a "security matter." He did not inform the petitioner that there was any investigation pending concerning him, and did not mention that the petitioner was to be questioned concerning his own actions. The agent told the petitioner that it would be more convenient to talk about the matter at the F. B. I. offices and requested the petitioner to accompany him there. The petitioner agreed to do so, and was conducted to the F. B. I. offices, down a private stairway, through various rooms, until they finally reached a very small room, measuring 8 feet by 10 feet and entirely secluded.

It was a very hot day, the temperature being well in the 90's, and the room where the examination was conducted had little ventilation and was extremely uncomfortable. After they had arrived there, other agents entered the room and DuBois asked a few questions about the woman in the security case. Then, suddenly, he launched into an intensive examination of the petitioner. The examination consumed more than two hours, and when the statement was finally obtained, or immediately thereafter, the petitioner was so agitated and in such a state of utter nervous

collapse that the principal examining agent said that he feared the petitioner would commit suicide, and kept reassuring him for some time in order to prevent a tragic end of the examination.

Likewise, the undisputed evidence established that the petitioner was suffering from a diseased mental condition; that he was highly suggestible; that he could be induced to do or say anything by suggestion; and would be inclined to say or do anything to extricate himself from an annoying situation.

It is submitted that the above uncontradicted facts are alone sufficient to invalidate the confession; but the involuntary nature of the confession is even more clearly shown when the so-called disputed facts are considered. We, of course, recognize the rule that where the evidence concerning the voluntary or involuntary nature of a confession is in hopeless conflict the question should be submitted to the jury for its determination; but we submit that this rule does not sanction the admission of a confession in evidence merely because there is *some* conflict. The Court may not blindly shut its eyes to reality, because if it does so the requirement that involuntary confessions be excluded would become an empty and hollow rule without practical application.

In the majority of cases, we submit, the natural tendency is for the police officers taking the confession to seek to justify the means by which it was obtained. We contend that even if there is some conflict in the evidence, if the accused's story showing the confession to be involuntary, in the light of the uncontradicted facts, is more reasonable than the other testimony, or serves as a reconciling factor in arriving at what actually took place at the time the confession was obtained, then the Court should, if in doubt as to the voluntary character of the confession, exclude it.

The chief examining agent, DuBois, testified that *immediately* after the confession was signed the petitioner exhibited signs of fearsome mental agitation of such degree that the agent feared the petitioner would commit suicide. The court below, we believe, misinterprets this testimony and adopts the version that it was only after the confession had been signed that the petitioner manifested signs of nervous collapse and inferentially, takes the position that at the moment the confession was signed the petitioner was in full control of his faculties, but that immediately thereafter he was in a state of nervous prostration.

Examination of the facts, which this Court has frequently said it is its duty to examine,[4] reveals the fallacy of the court's position. First, it is clear that for at least two hours, or perhaps three, the agents were interrogating the petitioner about his actions. Yet the statement finally secured was a short one, being only two and one-third pages written in longhand. It may be asked, what occurred during the long period of interrogation? According to the agent's testimony, the petitioner, as soon as questioned, immediately gave his statement. Why then did it take so long to write out such a short statement? It is submitted that the only fair conclusion is that for sometime the petitioner refused to make any incriminating statement, but finally did so under the sustained questioning of the agents.

Again, is it reasonable to believe that the petitioner's extremely agitated condition was brought about merely because he was freely giving a statement? Is it possible to make an artificial separation of the petitioner's state of mind at the time he signed the confession and his state of mind "immediately" thereafter? Experience in life prevents an acceptance of the view expressed by the court

[4] *Ashcraft v. Tennessee, supra*; *Lisenba v. California*, 314 U. S. 219, 237-8, 86 L. Ed. 166, 62 S. Ct. 280.

below. It is submitted, the only story worthy of belief is that a continued and relentless "sweating" process was the instrument which caused the confession to be made.

As aptly stated in *People v. Quan Gim Gow*, 23 Cal. A. 507, 138 P., 918-919:

> "It seems quite clear from the evidence of the conditions which surrounded the defendant at that time that he did not desire to make a statement. While no physical force was used and neither threats nor promises made, there can be no doubt at all but that the repeated questioning of the officers * * * finally wore through his mental resolution of silence. Admittedly, his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. When then did this unwillingness vanish and a desire to talk succeed it? Not after he had been given any period of time for reflection; for his inquisitors allowed him none. The examination was persisted in until a response was forthcoming and under these circumstances, it must be said that the responses appear to have been unwillingly made and as a direct result of continued importuning * * *."

Moreover, under the authorities, the petitioner's story cannot be disregarded completely. It is convincing and direct. He said that DuBois told him before he went to the F. B. I. offices that the questions about the woman would take only a few minutes; that when the agents were questioning him about his connection with Ruby, etc., he many times answered them, but they repeatedly told him he was a liar; that he would not be permitted to leave the room until he had given a statement satisfactory to them; that "if you don't tell us everything it will go very tough on you"; that they would not permit him to leave the room and persisted relentlessly in questioning him. The petitioner complained that he had a headache, felt sick, and said

that he would have done anything to get out of the room. He asked them to permit him to go into the hall and get some air, but they refused to permit this, and kept telling him again and again that he was lying.

The incessant grilling wore down the petitioner's innately weak resistance until he was finally in a state of nervous collapse, mentally prostrate, and in the condition so eloquently expressed by this Court in *Bram v. U. S.* (168 U. S. 532, 547, 42 L. Ed. 568, 18 S. Ct. 183)

> "The human mind under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail."

In *Flamme v. State,* 171 Wis. 501, 177 N. W. 596, 598, the confession of a girl nineteen was in question. The sheriff asked her to accompany him to the District Attorney's office. Her mother went along but was not permitted in the room where the girl was questioned. The two officials were alone with the girl for about one and a half hours. The sheriff said she went with him freely and, although she at first denied criminal relations with Flamme, she later freely admitted her transgressions and voluntarily made a confession. The girl said that she was finally persuaded to confess upon the assurance that her statement would shield her from prosecution. The court evidently decided that the circumstances rendered the girl's testimony more credible than that of the law officers, and said that although it was satisfied that the officers made no promise of immunity from prosecution, yet

> "the facts and circumstances surrounding the securing of the confession indicate with reasonable certainty that * * * [she] did not act freely and voluntarily in her disclosures".

In *People v. Prestige*, 182 Mich. 80, 148 N. W. 347, 348, the court decided that a confession made after a severe grilling for upwards of two hours by three law officers was erroneously admitted. Said the court:

> "The respondent states that during the time of the examination he was very nervous and nearly crazy. It is not incredible that he should have been in that condition at the end of two or three hours of grilling such as he received. It is needless to argue that a statement made under such pressure is voluntary, whether it is true or false."

Likewise, in *Perrygo v. U. S.*, 2 F. (2) 181 (C. A. D. C.), the court ruled that a confession given by a youth of weak mentality after one and a half hours of questioning was inadmissible.

The testimony relating to the petitioner's condition immediately upon signing the confession corroborates his story to such a degree that it becomes the only one worthy of belief. Upon cross examination DuBois testified that the petitioner was so wrought-up immediately after signing the confession that he, the agent, feared that the petitioner would commit suicide and he was so alarmed by the petitioner's condition and appearance that he did not permit him to leave for a period of about fifteen minutes, during which he kept reassuring him. This testimony from the Government's chief witness is corroboration of the highest evidentiary value.

A point of some significance, as bearing on the validity of the confession, is the fact that it was obtained as the result of continued questioning by police officers. Although a confession is not invalidated merely because it is obtained in this manner, (*Ashcraft v. Tennessee*, supra), it is a factor to be taken into consideration in determining whether the confession was voluntary.

In *Bram v. U. S., supra,* this Court said, at p. 557:

> "Whatever be the rule in this regard in England, however, it is certain that where a confession is elicited by the questions of a policeman the fact of its having been so obtained, it is conceded, may be an important element in determining whether the answers of the prisoner were voluntary. The attempt on the part of the police officer to obtain a confession by interrogating, has been often reproved by the English courts as unfair to the prisoner and as approaching dangerously to a violation of the law protecting an accused from being compelled to testify against himself."

How much more carefully must the facts be scrutinized when the interrogation is made of a mentally weak and diseased individual, as in the instant case!

Again, in an annotation appearing in 50 L. R. A. (N. S.), p. 1085, the editorial writer said:

> "The mere fact that a confession was given in response to questioning does not render it inadmissible, but where the interrogations are persisted in to an unreasonable extent, thereby producing mental anguish on the part of the accused, the confession or admission thus obtained, should be wholly rejected as involuntary, the same as if it had been obtained by the infliction of physical torture."

The petitioner's mental anguish at the time he made the confession is directly established by the testimony of the chief examining agent.

In *State v. Thomas,* 250 Mo. 189, 157 S. W. 330, the court said that where the accused is led to believe that he is bound to make a statement to secure surcease from the questions or importunities of those having him in charge, it would be a parody upon the words to call such a statement "voluntary."

Therefore, the refusal of the court below to consider the petitioner's mental infirmity and his extreme suggestibility in connection with the circumstances under which the confession was made is at variance with the authorities as well as with sound reason; and resulted in the admission of an involuntary confession. For when these important facts are borne in mind the involuntary character of this confession is clear; and if any doubt exists as to whether, under all the facts, the confession was voluntary or involuntary, under the rule laid down by this Court in the *Bram* case, that doubt must be resolved in favor of the petitioner and the confession must be rejected:

> "* * * In the case before us, we find that an influence was exerted, and as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed * * * in admitting the confession."

CONCLUSION.

The Writ of Certiorari should issue to review the judgments of the Circuit Court below for three compelling reasons.

1. The court below has sanctioned the use of substantially defective indictments ostensibly on the ground that such imperfections as existed were matters of form only and did not prejudice the accused. However, the substantial nature of the imperfections in the indictments and the unmistakable prejudice to the petitioner are clear upon an examination of the instant cases in the light of controlling adjudications of this court and decisions of other courts. This court should determine whether the requirements of criminal pleading have been relaxed to the extent sanctioned by the Court below.

2. In permitting conjecture to supply an essential element of the offense charged, the court below improperly construed an important federal statute.

3. The refusal of the court below to consider the effect of the petitioner's uncontradicted mental weakness on the circumstances under which the confession was obtained, establishes an unfair and unsound rule and in the immediate case, resulted in the admission of a confession involuntary in law.

Respectfully submitted,

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